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No. 140.

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vs.

THE UNITED STATES.

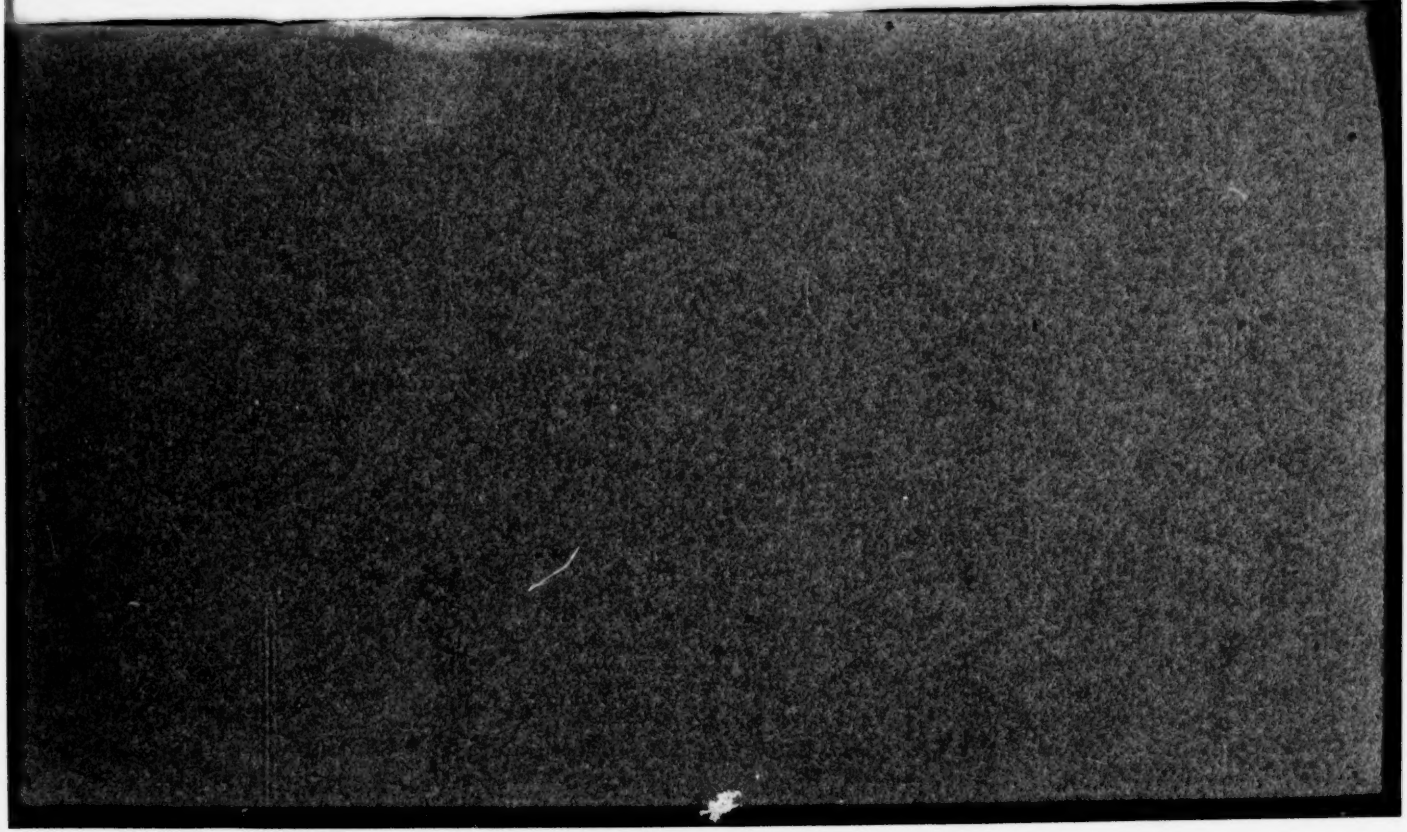
[illegible]

APPEAL FROM THE COURT OF CLAIMS.

[illegible]

FILED OCTOBER 8, 1898.

(17,009.)



(17,009.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 145.

JOHN N. QUACKENBUSH, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed September 11, 1898	1	1
Traverse	4	3
Counter-claim	5	3
Findings of fact and conclusion of law	6	3
Opinion of the court	12	10
Judgment of the court	15	14
Application for and allowance of appeal	16	14
Certificate of clerk	17	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 10, 1899.

1 In the Court of Claims.

JOHN N. QUACKENBUSH
vs.
THE UNITED STATES. } No. 20880.

I.—*Petition. Filed September* 11, 1897.

To the honorable the Chief Justice and associate justices of the Court of Claims:

Your petitioner, John N. Quackenbush, respectfully shows to your honors:

First. He is a citizen of the United States, and an officer in the navy thereof, to wit: a commander on the retired list.

Second. On the 25th day of May, 1873, he was duly and legally appointed and commissioned a commander on the active list of said navy, and performed all the duties appertaining to his office, until on or about the 1st day of August, 1883, when by direction of the then lawfully constituted Secretary of the Navy, without notice to claimant, and without any lawful authority whatsoever—without the direction of the President of the United States, and in violation of his legal rights—claimant's name was dropped from the

2 register of the commissioned and warrant officers of the Navy of the United States, and thenceforth, until the 26th day of May, 1897, he, the said claimant, was unlawfully deprived of all his legal rights as a commander in the Navy of the United States.

Third. The Congress of the United States, fully recognizing the foregoing facts, and intending to restore claimant to his proper legal status and to all the rights of which he had been illegally deprived as aforesaid, passed an act entitled, "An act for the relief of John N. Quackenbush, late a commander in the United States Navy (private, No. 169)," which said act was received by the President of the United States on the 4th day of February, 1897, and the same not having been returned to the house of Congress in which it originated, within the time prescribed by the Constitution of the United States, it became a law without his approval.

Fourth. By the terms of said act of Congress the President of the United States was authorized "in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint said John N. Quackenbush, late a commander in the Navy of the United States, to the same grade and rank of commander in the United States Navy, as of the date of August first, eighteen hundred and eighty-three, and to place him on the retired list of the navy, as of the date of June first, eighteen hundred and ninety-five."

Fifth. In pursuance of the authority vested in him by said act of Congress, the President of the United States did, by and with the

advice and consent of the Senate, on the 20th day of May,
3 1897, appoint and commission claimant "a commander in the navy from the 1st day of August, 1883, in the service of the United States."

Sixth. If claimant had not been illegally dropped from the "Register of the commissioned and warrant officers of the Navy of the United States, etc.," as above set forth, in paragraph 2d, he would have been retired by operation of law in the grade of commander, on the 1st day of June, 1895 (sec. 1444, R. S.), he having then reached the age of 62 years.

Seventh. In pursuance of said act of Congress claimant took the prescribed oath of office on the 26th day of May, 1897, and was duly enrolled on the pay-rolls of the United States Navy, from which date he has been receiving three-fourths of the sea pay of an officer of his rank and grade on the active list, as prescribed by law. (Secs. 1556 and 1588, R. S.)

Wherefore, your petitioner says, that in view of the foregoing, and of the laws of the United States (secs. 1444, 1556, and 1588, R. S.), and of the said private act, No. 169, and in good conscience and equity he should be paid from the 1st day of August, 1883, until the 1st day of June, 1895, at the rate of $2,300 per annum, being the leave or waiting-orders pay as prescribed by law for the grade or rank of commander, and from the 1st day of June, 1895, to the 26th day of May, 1897, at the rate of $2,625 per annum, being three-fourths of the sea pay as prescribed by law for the grade or rank of commander, and, therefore, your petitioner demands judgment in the sum of $—.

Your petitioner further shows that he has never borne arms against the United States, and has never given aid or comfort to rebellion against the same, and that he has not assigned this claim, or any portion thereof, and that he has appointed Mr. John Paul Jones, No. 1406 G street, Washington, D. C., his attorney for the prosecution of the same.

JOHN N. QUACKENBUSH.

Personally appeared before me this 9th day of Sept., 1897, John N. Quackenbush, petitioner in the above-entitled cause, and being duly sworn, upon his oath says, that the matters and facts as stated above are true to the best of his knowledge and belief.

[SEAL.] JAMES B. SHALLENBERGER,
Notary Public, D. C.

JOHN PAUL JONES,
Attorney for Claimant.

4 II.—*Traverse. Filed December* 18, 1897.

In the Court of Claims of the United States, December Term, A. D. 1897.

JOHN N. QUACKENBUSH
vs.
THE UNITED STATES. } No. 20880.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

5 III.—*Plea of Counter-claim. Filed March* 24, 1898.

Now comes the defendants, by the Attorney General, and, while denying the claimant's right of action in the above-entitled causes, alleges, by way of counter-claim, that the said claimant at the commencement of this suit was and still is indebted to the defendants in amount equal to nine thousand dollars by reason of payments illegally made to him during the period from June 9, 1874, up to and including March 31, 1881, when the claimant was not in the naval service of the United States, and for this amount defendants ask judgment.

L. A. PRADT,
Assistant Attorney General.

6 IV.—*Findings of Fact and Conclusion of Law. Filed April* 25, 1898.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

Claimant was duly and legally commissioned a commander in the Navy of the United States, by and with the consent of the Senate, on the 2d day of January, 1872, to take rank from the 25th day of May, 1871.

II.

Thereafter, to wit, in the month of February, A. D. 1874, certain charges were filed against claimant before the Navy Department, and a court-martial duly organized to try the same, and after having a full and lawful hearing upon the same, claimant was sentenced by the said court-martial "to be dismissed from the naval service of the United States."

This sentence was approved by the President, and the Hon.

George M. Robeson, then Secretary of the Navy, on the 9th of June, 1874, addressed the following to claimant, at Boston, Mass.:

"The naval general court-martial by which you were tried at Washington, D. C., in February last, found you guilty of the charges preferred against you, and sentenced you "to be dismissed from the naval service of the United States," and the President of the United States having approved the sentence, you will, from this date, cease to be an officer of the navy.

III.

Thereafter, to wit, on the 12th day of June, 1874, the Secretary of the Navy addressed the following letter to claimant:

NAVY DEPARTMENT,
WASHINGTON, D. C., *June* 12, 1874.

SIR: You will please return to the department the order dismissing you from the navy.

Respectfully, GEO. M. ROBESON,
Secretary of the Navy.

Commander John N. Quackenbush, U. S. Navy.

IV.

Both the foregoing letters were, in due course of mail, delivered to claimant at one and the same time, to wit, on or about the 15th day of June, A. D. 1874, claimant then being at Grantville, Mass.

7 V.

In obedience to said order of June 12, 1874, addressed to him officially as a commander in the navy, claimant did, on or about the said 15th day of June, A. D. 1874, return said order dismissing him from the navy, inclosed in the following official communication:

103 MOUNT VERNON ST., BOSTON, MASS.

SIR: I have to respectfully acknowledge the receipt of your communication of the 12th inst., and in obedience thereto herewith inclose my letter of dismissal from the navy.

I am, very respectfully, your obedient servant,
J. N. QUACKENBUSH,
Commander, U. S. Navy.

VI.

Thereafter, to wit, on the 8th day of December, A. D. 1874, the Secretary of the Navy officially addressed to claimant, as a commander in the navy, the following letter:

NAVY DEPARTMENT,
WASHINGTON, D. C., *December 8th*, 1874.

SIR: The naval general court-martial by which you were tried in February last found you guilty of the charges preferred against

you and sentenced you to be dismissed from the naval service of the United States.

This sentence was, on the 9th day of June, 1874, mitigated to suspension from rank and duty on furlough pay for six years, the suspension to date from that day.

Very respectfully, GEORGE M. ROBESON,
Secretary of the Navy.

Commander John N. Quackenbush, U. S. Navy, 103 Mount Vernon street, Boston, Mass.

VII.

Pursuant to said commuted sentence, and by virtue thereof, claimant was placed under suspension, and was borne upon the official printed Navy Register as a commander in the navy "under suspension," as indicated by a star and a note to that effect, as is usual in such cases, from the year 1874 up to and including the year 1880, when his said sentence of suspension on furlough pay for six years expired, and from and after the date of the expiration of said sentence he was borne upon said official printed Navy Register as a commander in the navy on waiting orders up to the publication of said register for the year 1883, when his name was omitted and dropped from the same by direction of the Secretary of the Navy.

During the whole of said period he retained his proper and legal place on the official list of commanders in the navy, and was advanced in numbers from year to year, as promotions of his seniors in said grade occurred, in the same manner and in all respects in the regular course, as other officers in his said grade and rank were advanced.

VIII.

From the 9th day of June, A. D. 1874, up to the 8th day of June, A. D. 1880, claimant was paid, pursuant to said sentence of court-martial, at the rate of $1,150 per annum; the same being the furlough pay of his grade and rank.

8

IX.

On or about the 10th day of June, A. D. 1880, and immediately after the expiration of his said sentence of court-martial, claimant officially reported to the Navy Department for such duty, pertinent to his grade or rank, as might be assigned to him, and also on the 2d day of June, 1880, wrote to the proper accounting officer of the Treasury requesting him to direct the paymaster at the navy yard, Boston, Mass., to credit him, the said claimant, with the proper rate of pay from and after the 9th day of June, A. D. 1880. In reply to the said letter to the accounting officer of the Treasury, as aforesaid, claimant received a communication of date June 5, 1880, notifying him that the said paymaster had been authorized to take him, said claimant, upon his pay rolls, as on "waiting-orders pay." In obedience to such authorization the said paymaster took claimant upon his pay-rolls and paid him as on "waiting-orders pay" from the 9th

of June, A. D. 1880, up to and including the 31st day of March, A. D. 1881, from and after which last-mentioned date claimant has never received any pay, allowances, or emoluments of any kind whatsoever from the Government of the United States for his services as a commander in the navy, excepting only as hereafter set forth in finding No. XVIII.

X.

On the 13th day of December, A. D. 1877, the then Secretary of the Navy wrote the following letter of inquiry to the Attorney General of the United States:

NAVY DEPARTMENT, *December* 13, 1877.

SIR: I have the honor to submit to you the following statement of facts:

John N. Quackenbush, a commander in the navy, was tried by court martial on certain charges preferred by the Secretary of the Navy, under date of February 6, 1874; was found guilty of the charges, and sentenced to be dismissed from the naval service of the United States.

The record of proceedings and findings of the court-martial was submitted by letter in the following words to the President of the United States:

"NAVY DEPARTMENT, *June* 4, 1874.

"SIR: I have the honor to submit herewith the record of the proceedings of a naval general court-martial in the case of Commander John N. Quackenbush, of the navy, who has been found guilty of the charges of 'drunkenness' and 'scandalous conduct tending to the destruction of good morals,' and sentenced to 'be dismissed from the naval service of the United States.'

"Very respectfully, GEO. M. ROBESON,
"*Secretary of the Navy.*

"The President."

The President indorsed the record, as follows:

"EXECUTIVE MANSION, *June* 5, 1874.

"The sentence of dismissal in the case of Commander John N. Quackenbush is hereby approved.

"U. S. GRANT."

Whereupon the following letter was addressed to Mr. Quackenbush by the Secretary of the Navy:

"NAVY DEPARTMENT, *June* 9, 1874.

"Commander John N. Quackenbush, 103 Mount Vernon street, Boston, Mass.

"SIR: The naval general court-martial by which you were tried at Washington, D. C., in February last, found you guilty of the
9 charges preferred against you, and sentenced you 'to be dismissed from the naval service of the United States,' and the

President of the United States having approved this sentence, you will, from this date, cease to be an officer of the navy.

"Very respectfully, GEO. M. ROBESON,
"*Secretary of the Navy.*"

And the auditor of the Treasury was notified the same day.

June 10, 1874, Lieut. Commander Winfield S. Schley was nominated "to be a commander in the navy from the 10th of June, 1874, vice Commander John N. Quackenbush, dismissed," and was confirmed June 12, 1874, and a commission issued to him on the same day.

June 12, 1874, the Secretary of the Navy addressed the following communication to Mr. Quackenbush:

"NAVY DEPARTMENT, *June* 12, 1874.

"SIR: You will please return to the department the order dismissing you from the navy.

"Respectfully, GEO. M. ROBESON,
"*Secretary of the Navy.*

"Commander J. N. Quackenbush, U. S. Navy."

In reply to this Mr. Quackenbush returned the said letter of dismissal with a letter to the Secretary of the Navy in the following words:

"103 MOUNT VERNON ST., BOSTON, MASS.

"SIR: I have to respectfully acknowledge the receipt of your communication of the 12th instant, and in obedience thereto herewith inclose my letter of dismissal from the navy.

"I am, very respectfully, your obedient servant,
"J. N. QUACKENBUSH,
"*Commander, U. S. Navy.*

"Hon. Geo. M. Robeson, Secretary of the Navy, Washington, D. C."

December 8, 1874, the Secretary of the Navy wrote to Mr. Quackenbush as follows:

"NAVY DEPARTMENT, *8th December*, 1874.

"Commander J. N. Quackenbush, No. 103 Mt. Vernon St., Boston, Mass.

"SIR: The naval general court-martial by which you were tried in February last found you guilty of the charges preferred against you and sentenced you 'to be dismissed from the naval service of the United States.'

"This sentence was, on the 9th day of June, 1874, mitigated to suspension from rank and duty, on furlough pay, for six (6) years, the suspension to date from that day.

"Very respectfully, GEO. M. ROBESON,
"*Secretary of the Navy.*"

And the Fourth Auditor of the Treasury was so notified the same day.

Your opinion is desired as to whether it is competent to admit parol evidence that the President assented to the mitigation, on the 9th day of June, of the sentence of dismissal; and, if so, whether the President had the power to so remit after the sentence of dismissal had been approved and duly executed and the vacancy filled.

Very respectfully, R. W. THOMPSON,
Secretary of the Navy.

Hon. Chas. Devens, Attorney General.

The Attorney General in answer thereto, on the 16th day of March, A. D. 1878, advised the said Secretary of the Navy that claimant was, in fact and in law, an officer in the navy; and the said Secretary of the Navy acted upon such advice, and thereafter recognized the claimant as a commander in the Navy of the United States. Thereafter under the authority and direction of the Secretary of the Navy, claimant served out the unexpired portion of said sentence of court-martial, as commuted as aforesaid.

10 XI.

On the 10th day of June, A. D. 1874, the next succeeding the date of the commutation of claimant's said sentence of court-martial, the President nominated to the Senate the name of W. S. Schley to be a commander in the navy, "vice Quackenbush dismissed," and the same was duly confirmed on the 12th day of June, A. D. 1874; the same day upon which the Secretary of the Navy ordered "John N. Quackenbush, commander, United States Navy," to "return to the department the order dismissing him from the navy," as set forth in request for findings, No. III.

XII.

The records of the Navy Department show that there were ninety commanders borne on the active list of the navy from the date of the appointment of W. S. Schley to August 5, 1882, the date when the number was reduced by law, except during the early part of 1879, when the list was temporarily increased to ninety-one by the restoration of Lieut. Commander H. E. Mullan to his original position on the list of commanders, by act of Congress.

XIII.

On the 13th day of April, A. D. 1882, the Secretary of the Navy addressed the following letter to the Hon. B. W. Harris, chairman Committee on Naval Affairs, House of Representatives:

NAVY DEPARTMENT,
WASHINGTON, D. C., *April* 13, 1882.

SIR: I have the honor to acknowledge the receipt of your communication of the 6th instant, inclosing the bill H. R. 5300, "to

confirm the status of John N. Quackenbush, a commander in the United States Navy," and requesting my views as to the propriety of the passage of the bill.

In reply I have to state that it appears to have been the intention of the President in exercising clemency in the case of Commander Quackenbush that he should be retained in the service. The sentence of the court as mitigated was fully executed, and during the period of his suspension from duty under that sentence, and until April last, Commander Quackenbush was officially recognized as an officer of the navy.

It also appears from testimonial letters presented to the department by Commander Quackenbush that since his suspension from duty in 1874 to the present time his conduct has been unexceptionable.

In view of all the circumstances in this case, it seems just that Commander Quackenbush should be entitled to the benefit of the clemency which the President evidently intended to exercise in his behalf.

The bill is herewith returned.

Very respectfully, WILLIAM H. HUNT,
Secretary of the Navy.

Hon. B. W. Harris, chairman Committee on Naval Affairs, House of Representatives.

XIV.

The following appears opposite claimant's name on page 207 of the Register of the Navy, "O" No. 1, one of the records of the Navy Department:

208. John N. Quackenbush.

Left off the register published 1st August, 1883, by direction of the Secretary of the Navy; his action being based upon a decision of the Supreme Court.

11 XV.

On or about the 6th day of December, A. D. 1883, the Secretary of the Navy designated to the President D. W. Mullan to be a commander in the navy, "vice John N. Quackenbush, no longer in the service;" and in the said month of December the President of the United States sent to the Senate of the United States the nomination of said Mullan to be a commander in the navy, from the 3d day of July, 1882, "vice John N. Quackenbush, no longer in the service," which said nomination was duly confirmed, and thereupon the said Mullan was commissioned to rank from said latter date.

XVI.

On the 15th day of April, 1895, claimant filed his petition before the Secretary of the Navy, praying that he be restored to his proper position on the list of naval officers, from which he had been removed, but the said Secretary of the Navy refused to grant claimant any relief whatever, holding that the matter of his rights was

res judicata, under the action taken by his predecessor, as fully set forth in finding Nos. XIV and XV.

XVII.

Therefore, to wit, May, 1895, claimant filed a petition in the supreme court of the District of Columbia, praying that a writ of mandamus issue, directed to the Secretary of the Navy, commanding and requiring him to put claimant's name back on the list of naval officers, from which it had been, through error, mistake, neglect, or inadvertence illegally dropped or omitted, and Associate Justice Bradley, of said court, did on the 11th day of February, 1896, refuse to issue said writ.

XVIII.

Thereafter, to wit, on the — day of ——, 1897, and in pursuance of the terms of the act passed for his relief, the President nominated the claimant to the Senate to be a commander on the retired list of the navy, and he was duly confirmed on the — day of ——, 1897, and took the oath of office as was required of him so to do, on the 26th day of May, A. D. 1897, since which last-mentioned date he has been paid at the rate of $2,625, the same being three-fourths of the sea pay of a commander in the navy on the active list.

XIX.

Claimant reached the age of 62 on the 31st day of May, A. D. 1895.

Counter-claim.

During the period of service by the claimant under suspension, to wit, from June 9, 1874, to June 9, 1880, he was paid the sum of $1,150 per annum, or $6,900; and while serving on leave or waiting orders, from the latter date to March 31, 1881, he was paid at the rate of $2,300 per annum, or $1,794.90, amounting in the aggregate to $8,694.90, which latter amount the defendants ask may be set off against so much of any sum which may be found due the claimant, if any; and they ask judgment against him in their favor for said sum or any balance that may remain in their favor in case of set-off as aforesaid.

Conclusions of Law.

Upon the foregoing findings of fact the court decides as conclusion of law that the petition and counter-claim both be dismissed.

12 V.—*Opinion of the Court.*

PEELLE, J., delivered the opinion of the court:

The claimant seeks to recover under the following statute the pay of commander in the United States Navy as on leave or waiting orders from August 1, 1883, to June 1, 1895, and three-fourths of the sea pay provided by law for a commander on the retired list from the latter date to May 26, 1897:

(Private—No. 169.)

An act for the relief of John N Quackenbush, late a commander in the United States Navy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of law regulating the appointments in the navy by promotion in the line and limiting the number of commanders to be appointed in the United States naval service are hereby suspended for the purpose of this act only, and only so far as they affect John N. Quackenbush; and the President of the United States is hereby authorized, in the exercise of his discretion and judgment, to nominate and, by and with the advice and consent of the Senate, to appoint the said John N. Quackenbush, late a commander in the United States Navy, to the same grade and rank of commander in the United States Navy as of the date of August 1, 1883, and to place him on the retired list of the navy as of the date of June 1, 1895: Provided, that he shall receive no pay or emoluments except from the date of such reappointment.

The facts are:

The claimant, while a commander in the United States Navy, was tried by a naval general court-martial and sentenced to be dismissed from the naval service of the United States, which sentence was approved by the President June 5, 1874, with his sign manual, official notice of which was mailed to the claimant at his address in Boston, Mass., by the Secretary of the Navy, June 9, 1874.

The next day, June 10, the President nominated W. S. Schley to the Senate to be commander, "vice Quackenbush, dismissed," and two days later, June 12, he was confirmed, and thereafter duly appointed commander by the President, the full quota of ninety commanders then allowed by Revised Statutes, section 1363, thereby being filled.

The same day on which Schley was confirmed, June 12, the Secretary of the Navy addressed a communication to the claimant requesting him to "return to the department the order dismissing him from the navy," and by reason of the claimant being in Grantville at that time instead of Boston, the communication of June 9, notifying him of the President's approval of the sentence of dismissal, as well as the one of June 12, requesting him to return the order of dismissal, were both delivered to him at the same time—June 15.

December 8, 1874, the Secretary of the Navy addressed a letter to the claimant by which he was informed that the naval
13 general court-martial, by which he had been tried and found guilty of the charge preferred against him and sentenced to be dismissed from the naval service, had, on June 9, 1874, been "mitigated to suspension from rank and duty on furlough pay for six years, the suspension to date from that day."

The claimant served under suspension and was paid as on furlough for six years, and from June 9, 1880, to March 31, 1881, he

was taken on the rolls of the paymaster at the navy yard, Boston, Mass., and paid as on "waiting orders."

The claimant's name was left off the official Navy Register, published August 1, 1883, by direction of the then Secretary of the Navy, and thereafter, in December, 1883, the President nominated D. W. Mullan to the Senate to be commander "vice John N. Quackenbush, no longer in the service," which nomination was confirmed, and said Mullan was thereafter duly appointed commander by the President, thus again filling the quota of commanders then allowed by law.

The claimant's contention is that he was never legally out of the naval service, while the defendants insist that the sentence of the court-martial, so approved by the President, followed by the appointment, with the advice and consent of the Senate, of W. S. Schley as commander in the claimant's stead, operated to dismiss or remove him from the service, and that it was not within the power of the President to annul the sentence or to mitigate it to suspension, and that, therefore, the money paid him while under suspension and while on waiting orders was illegally paid, and should be set off against so much of any sum which may be found due the claimant, and judgment rendered against him for any balance due the defendants.

The validity of the sentence of the court-martial to dismiss or of the appointment by the President of W. S. Schley to remove the claimant from the naval service becomes important here only in respect of the claimant's right to retain the money thereafter paid to him; for, conceding that the claimant was legally out of the service, either by dismissal or by removal, as the Congress, by the special act authorizing his reappointment, manifestly assumed, still it was within the power of Congress to pass the act authorizing the President, with the advice and consent of the Senate, to reappoint the claimant commander as of any date subsequent to the date of dismissal under the sentence of the court-martial.

The Congress by their act construe the sentence and the action of the Executive as having terminated the claimant's service in the navy, by referring to him as "late commander in the United States Navy," and by providing for his reappointment "to the same grade and rank" theretofore held by him, which appointment he accepted and still holds.

That the Congress were of the opinion that some injustice had been done the claimant is evident from the act, as otherwise his appointment would not have been authorized, and certainly not "as of the date of August 1, 1883."

But whether the claimant was, by virtue of the sentence of the court-martial or of the appointment of W. S. Schley, legally out of the naval service at the time of the passage of the act authorizing his reappointment we deem it unnecessary to determine, as we are of the opinion that the rights of the parties must be measured by the act under which the claimant seeks to recover.

14 The act, as we have said, assumes that some injustice had been done the claimant, and if so it would not be consistent

therewith to hold that the defendants were entitled to recover on their counter-claim.

On the other hand, while the act authorizes the President to appoint the claimant, "late a commander in the United States Navy, to the same grade and rank * * * as of the date of August 1, 1883, and to place him on the retired list of the navy as of the date of June 1, 1895," the proviso thereto is "that he shall receive no pay or emoluments except from the date of such reappointment."

The claimant's appointment to the same grade and rank as of the date of August 1, 1883, was manifestly intended only to fix the claimant's status in respect of the grade and rank to which he claims he was entitled when his name was left off the register by direction of the Secretary of the Navy and Mullan was appointed in his stead, under the decision in the case of Blake *v.* The United States (103 U. S. R., 227), but not having rendered any service to the United States during that period, and another having been paid the salary therefor, Congress added the proviso, thereby in effect saying that although you were out of the service by reason of the action of the appointing power, still inasmuch as the department recognized you as in the service until August 1, 1883, we will sanction the action of the department by giving you the same grade and rank as of that date, but having rendered no service to the United States since that date, we will not pay you anything prior to the date of your reappointment, hence the proviso "that he shall receive no pay or emoluments except from the date of such reappointment."

And herein lies the difference between this case and the Collins case (15 C. Cls. R., 22), McAlpine case (27 C. Cls. R., 491), and other like cases cited and relied upon by the claimant.

The claimant, however, contends, and the able brief and argument of his counsel apparently justify the contention, that the use of the word "reappointment" in the proviso refers back and relates to August 1, 1883, as the date from which the claimant's pay should begin; but if that be the correct construction, then the proviso is a nullity, as it is clear that without the proviso the claimant could not, under the authority of the adjudicated cases cited by the claimant, recover for salary prior to August 1, 1883. So that the proviso must be given some effect different from that which would exist without it.

The office and purpose of the proviso evidently was to limit the claimant's right in respect of pay, thereby excepting from the operation of the statute that which would otherwise have been included in it. This is familiar law.

Hence, adhering to the well-established rule of interpretation that statutes should be construed as a whole and effect given, if that can be done, to every word or part thereof, we must hold that the act under which the claimant seeks to recover limits him in respect of his right to pay to the date of his appointment, which was May 26, 1897, though for the purpose of fixing his status as to "grade and rank as commander," he was appointed "as of the date of August 1, 1883."

The act recites that the claimant was "late a commander in the

United States Navy," and that the President was thereby authorized to appoint him "to the same grade and rank of commander in the United States Navy," so that although the word appoint is used it was in fact a reappointment of the claimant to his former grade and rank as commander; and if Congress had intended that the claimant should be paid as such from August 1, 1883, they would have said so in more apt and definite language, and not having done so, we must give to the proviso, in its relation to the other parts of the act, the meaning which its office implies, *i. e.*, a limitation upon the claimant's right under the act different from that which would exist without it.

What we have said in respect to the claimant's right to pay applies, of course, to the period between the dates of his retirement and appointment, though it is clear that placing the claimant on the retired list was not an act of appointment or of reappointment, but was consequent upon his having reached the legal age for retirement.

For the reasons stated the petition and the counter-claim are both dismissed.

Davis, J., was not present when this case was tried and took no part in the decision.

15 VI.—*Judgment of the Court.*

JOHN N. QUACKENBUSH
vs.
THE UNITED STATES. } No. 20880.

At a Court of Claims held in the city of Washington on the 25th day of April, A. D. 1898, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, do order, adjudge, and decree that the petition of the claimant in the above-entitled cause and the counter-claim of the defendants filed therein be dismissed.

BY THE COURT.

16 VII.—*Application for and Allowance of Appeal.*

JOHN N. QUACKENBUSH
vs.
THE UNITED STATES. } No. 20880.

And now comes the claimant, by his attorney, and moves the court that an appeal be granted from the judgment heretofore rendered, to wit, on the 25th day of April, 1898, in the above-entitled cause.

JOHN PAUL JONES,
Attorney for Claimant.

Filed June 20, 1898.

At a Court of Claims held June 20, 1898, Mr. Jones, attorney for claimant in the above-entitled cause, having presented an application for the allowance of appeal, it was ordered that it be allowed as prayed for.

BY THE COURT.

17 In the Court of Claims.

JOHN N. QUACKENBUSH
vs.
THE UNITED STATES. } No. 20880.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, the opinion of the court, the judgment of the court, the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 13th day of September, 1898.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 17,009. Court of Claims. Term No., 145. John N. Quackenbush, appellant, *vs.* The United States. Filed October 5th, 1898.